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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1267

BAYSIDE ENTERPRISES, INC., et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

Georgia Poultry Federation, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the Petitioner has been obtained. Counsel has been advised that the Solicitor General, as attorney for the Respondent, will not oppose the filing of the brief if filed sufficiently prior to oral argument.

The interest of the Georgia Poultry Federation in this case arises from the fact that it is an association whose membership includes all integrated poultry producers in the State of Georgia, each of whom will be substantially affected by the ruling in this case. Like the Petitioners herein, these members of the Georgia Poultry Federation are companies engaged in the production of poultry who use contract growers during the growout phase of production, but who generally own the poultry throughout all stages of production, supply the initiative for and major investment in the production, and make all the important decisions with respect to both production and marketing of the agricultural product. These integrated producers thus perform the critical functions and face the traditional risks which are inherent in the role of the farmer producing an agricultural product.

The qualification of integrated poultry producers as agricultural producers entitled to the special consideration afforded by Congress to such producers under a supportive national agriculture policy implemented by a comprehensive statutory scheme, including the labor exemption at issue here, is a matter of paramount importance to all poultry producers. It is likely that the decision in this case will control the application of agricultural exemptions to integrated poultry producers in a variety of contexts, including federal and state taxation and antitrust laws in addition to the Fair Labor Standards Act and the National Labor Relations Act.

The character of integrated poultry production operations as "agriculture" and "farming" has been recognized and affirmed repeatedly by the Fifth, Eighth, and Ninth Circuits. This case offers the Court an opportunity to make the practical reasoning of those circuits binding and conclusive in all areas where poultry is produced in the United States.

The Petitioners have relied upon a distinction between a "primary" and "secondary" meaning of agriculture drawn by the

Court below from this Court's decision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), and have limited their argument before this Court to a contention that Bayside and its employees fall only within the "secondary branch of farming". (Pet. Br. at 6). It is believed that Bayside and other integrated poultry producers fall within the "primary" meaning of agriculture as this Court intended the definition to be read, and the attached brief which *amicus curiae* is requesting permission to file develops this argument for the Court's consideration. The "primary" definition argument offered by *amicus curiae*, which is not otherwise developed in briefs before the Court, would be dispositive of this case if accepted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

INTEREST OF THE AMICUS CURIAE

The Georgia Poultry Federation includes in its membership all integrated producers of broilers, eggs and turkeys in Georgia. Georgia is the poultry capital of the world, leading all states in total income from poultry and poultry products.

The integrated poultry producers who are members of the Georgia Poultry Federation have a vital interest in the decision of this case for two reasons: (a) it will directly affect the right of all of them to claim the specific exemption at issue here, and (b) the decision in this case is likely to control indirectly the application of agricultural exemptions to integrated poultry producers in a variety of contexts, including federal and state taxation and antitrust, in addition to imposing upon them the broad requirements of the Fair Labor Standards Act and the National Labor Relations Act.

ARGUMENT

A. Poultry "Farming" Today Is Carried on Almost Exclusively by Integrated Producers Who Own the Birds, Initiate and Direct Production, and Bear the Risks of Production and Marketing.

The question of overriding general importance presented by this case is whether or not integrated poultry production as it is carried on today is "farming" or "agriculture". The techniques and organization of the poultry system are unique in agricultural production, and their uniqueness poses certain analytical problems in statutory application. Nevertheless, there can be no doubt that the result is an agricultural product, and the integrated poultry producer faces the same agricultural risks and problems which gave rise to the congressional concern for farmers underlying the creation of a comprehensive statutory scheme of protection for agricultural producers.

"Agriculture", in the terms of Fair Labor Standards Act Section 3(f), 29 U.S.C. 203(f), includes "farming in all its branches," including "the raising of . . . poultry." If what integrated poultry producers do is "farming", then they are exempt from a variety of requirements imposed generally upon employers under the Fair Labor Standards Act and the National Labor Relations Act.

Poultry "farming" today involves several stages and operations. For broiler chickens such as Bayside produces, it includes (a) the placement, raising and breeding of breeder flocks to produce eggs for hatching as broiler chicks, (b) the hatching of these eggs and the placement of the chicks for growout to maturity, (c) the growing of the broiler chicks to the age of maturity, (d) the catching, cooping and hauling of the grown-out birds to processing facilities, and (e) the operation of facilities to process and prepare the broilers for market.

In the present day broiler system, all or most of these operations are carried on by integrated producers through various kinds of employees and, during the growout stage, contract growers. The integrated producer provides the initiative for production in the first instance, directs the production operations in all phases, supplies inputs accounting for more than 90% of the production costs, makes all important production and marketing decisions, and bears the risk of being unable to market the agricultural product at a price adequate to cover the production and marketing costs.

During the growout phase, where contract growers are employed to house and care for the birds until they reach maturity, ownership of the birds remains in the integrators. In addition to owning the birds, the integrated producers choose the breed or type of broiler to be produced and make all decisions with respect to the number and timing of chick placements; supply the feed and make all decisions with regard to diet and type of feed; supply the medicines, vaccines and other health supplies for the birds; supply all veterinary services during the growout period; transport the chickens and feed to the growers, and transport the grown-out chickens from the growers to the processing plants; provide the equipment and some or all of the labor for catching, cooping and loading the live birds; and make all decisions with regard to the age and size at which the birds shall be marketed. Fieldmen or supervisors employed by the integrators provide supervision of the growout operation to assure that the grower is properly feeding, watering and otherwise caring for the producer's birds.

Having initiated, paid for and directed the production of broilers, the integrated producer must then market his product in a typical agricultural market. There is no live market for broilers today, and broilers are marketed in fresh, ready-to-cook form by the integrated producers. The product is highly perishable, and once production is committed, the integrator must either sell his

product or destroy it. Pricing is characterized by volatility and instability, a characteristic which is harmful to producers and consumers alike, and the product is distributed through middlemen intervening between the integrator and the consumer. Integrated broiler producers are scattered and largely uninformed with respect to inventories and demand, and the market is consequently highly susceptible to over-production. The demand for broilers is seasonal and cyclical, the market price fluctuates weekly and sometimes hourly, and the market is dominated by concentrated buyers. It is apparent from all of this that integrated broiler producers occupy the traditional role of "farmers" in producing and marketing an agricultural product.

B. Integrated Broiler Producers Such as Bayside Are Engaged in "Agriculture" in Its Primary Meaning—"The Raising of . . . Poultry."

The decision of the First Circuit Court of Appeals below was based on a misreading of this Court's decision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). In *Farmers Irrigation Co.*, this Court indeed observed that the section 3(f) definition of "agriculture" has two branches. "Farming in all its branches" was said to be the "primary meaning", and "practices performed either by a farmer or on a farm" fell within the "broader meaning" of agriculture. *Id.* at 762, 763. The Farmers Irrigation Company was organized solely to supply irrigation water to farmers, and it produced no product of its own at all, unless irrigation water is considered a product. Thus this Court observed that the Company for whose employees the exemption was claimed "owns no farms and raises no crops". *Id.* at 763. As the Court further noted: "The ditch company, then, is not engaged in cultivating or tilling the soil or in growing any agricultural commodity". *Id.* at 764. It is obvious therefore that the employer in Farmers Irrigation Co. was not "farming" in any branch, and the Court relied on the character

of the employer's activity to determine that its employees were not employed in agriculture under the "primary meaning" of the word.

Just the opposite is true with the Petitioner here and with all integrated poultry producers. Bayside is engaged in "growing an agricultural commodity"—fresh dressed broilers—as its principal and overriding function. All of its activities, from breeder farm to processing and marketing, are a part of its main business activity of producing and marketing broilers. The entire investment and effort of the integrated broiler producer are devoted principally to "agriculture" in one of its important branches—"the raising of . . . poultry". To hold otherwise is to ignore the purpose of the integrated operation entirely.

This practical reasoning underlies the view held by the Fifth,[1] Eighth[2] and Ninth[3] Circuits, which is directly contrary to the holding of the First Circuit in this case. In the *Tyson's Poultry* case, the Eighth Circuit held that employees who worked in an egg assembly plant operated by an integrated egg producing firm were "employed in agriculture" and thus exempt from the Fair Labor Standards Act. The appellees in Tyson's Poultry, Inc. (whose assembly plant employees were the workers involved), Poultry Growers, Inc., an affiliated corporation which produced eggs through contract growers similar to Bayside's broiler growers, a parent corporation which owned all the stock of the first

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[1] *McElrath Poultry Co., Inc. v. National Labor Relations Board*, 494 F.2d 518 (5th Cir. 1974); *Abbott Farms, Inc. v. National Labor Relations Board*, 487 F.2d 904 (5th Cir. 1973); *National Labor Relations Board v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969); *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957); *Nix v. Farmers' Mutual Exchange of Calhoun, Inc.*, 218 F.2d 642 (5th Cir. 1955).

[2] *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966).

[3] *National Labor Relations Board v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972).

two, and an individual who was president of all three corporations. The Eighth Circuit held as follows:

> "We are here concerned with a single and completely integrated farming operation carried on and headed up by appellees through their affiliated corporation, Poultry Growers, Inc. As found by the District Court, the appellees are farmers and are the ones who initiated the farming operations here involved. Without appellees the independent growers arguably would never have undertaken the initial and continuing cost of acquiring the birds and producing the eggs. The contract growers merely aid the appellees, who the District Court found to be the ones qualified to claim the agricultural exemption under the Act as to their employees engaged in the 'handling, cooling, grading, candling and packing' of eggs." 355 F.2d at 258.

The Fifth Circuit's decision in *Strain Poultry Farms, Inc.* is directly in point, and directly contrary to the decision of the Court of Appeals in this case. Strain was an integrated broiler producer, and the National Labor Relations Board found Strain guilty of unfair labor practices under the National Labor Relations Act. The NLRB petitioned for an enforcement order, and the Fifth Circuit denied enforcement on the ground that the employees involved—truck drivers employed by Strain to haul live chickens to processing plants—were "agricultural employees" within the meaning of 29 U.S.C. 152(3) (NLRA Section 2(3)) and 29 U.S.C. 203(f) (FLSA Section 3(f)). In *Strain*, as in this case, the integrated producer employed independent contract growers during the growout phase of broiler production.

The Board in *Strain* argued that the broilers were "the results of someone else's farming efforts—the independent growers," contending that the fact that Strain used independent growers destroyed its claim to having raised the birds. 405 F.2d at

1030. After carefully analyzing the applicable law and the form and function of Strain's integrated operation, the Court concluded as follows:

> "In summary, the Board's finding that the employees were not agricultural employees can only be sustained if respondent's arrangement with the independent growers is viewed as removing it from the primary definition of agriculture pertinent here, 'the raising of poultry'. Since we have concluded that this is not the case, there was no warrant in the record or a reasonable basis in law for the Board's conclusion that the employees were not 'agricultural laborers within the meaning of Section 2(3) of the NLRA.'" *Id.* at 1033.

As was the case with the delivery truck drivers in *Strain*, the activities of the feedtruck drivers in this case are not only incidental but are absolutely essential to the integrated poultry-raising operation here. These drivers deliver the feed rations—specified and mixed by Bayside—to Bayside 's broiler chickens housed in the contract growers' facilities. They are delivering Bayside's feed to Bayside's birds during the growout process. Delivering the feed to the birds is clearly an essential part of the integrated poultry-raising operation. This was the conclusion of the Fifth Circuit in *Strain*:

> "Furthermore, the trucking activities were part of Strain's poultry-raising venture. They were performed incident to or in conjunction with Strain's poultry-raising operations and Strain was not a poultry raiser conducting a trucking operation on the side. The trucking operation was a part of an integrated poultry-raising operation and, although unlike poultry farms of the past, it is today a typical broiler raising operation." Id. at 1032.

The reasoning of *Strain* was adopted, on "substantially identical" facts, by the Ninth Circuit in *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972). In *Ryckebosch*, the integrator also owned and operated a processing plant. See *Victor Ryckebosch, Inc.*, 189 NLRB 40, 41-42. The *Strain* reasoning has been reaffirmed twice more by the Fifth Circuit in recent years. *Abbott Farms, Inc.*, and *McElrath Poultry Co.*, *supra*, p. 5, n.1.

The same recognition of the realities of modern broiler production and its "farming" character underlies a number of decisions allowing integrated poultry producers to take advantage of various provisions of the Internal Revenue Code available only to "farmers". See *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957); *Maple Leaf Farms, Inc.*, 64 T.C. 438 (1975); *Garth*, 56 T.C. 610 (1971).

Respondent has made a point of arguing that contract growers bear some risks of loss in connection with the poultry raising operations at issue here. The Brief cites studies which indicate that growers make a sizable investment in land, poultry housing facilities, and related equipment. (Respondent's Br. 22, n.14). What the Respondent fails to mention is that the integrated broiler producers supply the birds themselves and inputs which together account for more than 90% of the cost per pound of producing broilers on an operating basis, including feed which accounts for more than half the total cost of producing broilers. Moreover, the growers are guaranteed a return for their labor and facilities, while the integrated producer must find a buyer for the agricultural product in the open market if he . to recover for his efforts and investment.

It is true that growers bear some risks during the growout phase ot broiler production. Nevertheless, there is nothing in the law to suggest that a farmer must bear 100% of the risk of producing and marketing his product in order to engage in "agriculture" or "farming". With the variety of crop mortgage financing available to farmers today, shared risk is more the

rule than the exception in modern farming. Moreover, the Fifth Circuit in *Strain* was not at all bothered by the fact that the poultry raising was "shared" with independent growers:

> "As in all the other cases cited by the Board on this point, the distinction between those situations and the present one is that these birds belonged to the respondent and, although the raising of them was shared with independent growers, Strain's activities were more nearly that of one engaged in the 'raising of . . . poultry' than that of a purchaser, jobber, etc." 405 F.2d at 1033.

There is no reason to conclude that contract growers, just because they may share some of the functions and some of the risks of poultry raising, are the only persons engaged in "agriculture".

CONCLUSION

Integrated poultry operations are organized and operated for one purpose: the production and marketing of broilers. As the *Strain* court observed of the integrated broiler producing operations before it, "although unlike poultry farms of the past, it is today a typical broiler raising operation". Integrated broiler production is within the "primary" definition of agriculture, and Bayside's feed truck drivers, who deliver the rations mixed and supplied by Bayside to the location where Bayside's broiler chickens are housed, are clearly essential to Bayside's integrated poultry raising operation. For this reason, the drivers are "agricultural laborers" within the meaning of the exemption, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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